United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-1189

To Be Argued By
Frederick H. Block

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee,

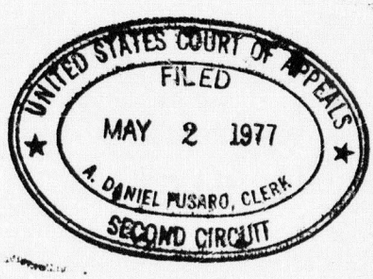
v.

LAWRENCE FRIEDMAN,

Appellant.

----------x

APPELLANT'S BRIEF



Frederick H. Block
Harvey N. Goldstein
Peter Brogan,
Of Counsel.

FREDERICK H. BLOCK
ATTORNEY AT LAW
919 THIRD AVENUE
NEW YORK, N. Y. 10022
(212) 752-4433

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
1. The Indictment	2
2. Summary of the Case	3
3. The Hearing	6
A. Introductory	6
B. The Duress Claim	7
C. The Broken Promise	13
POINT I - THE TRIAL JUDGE ERRED IN FINDING NO DURESS	28
POINT II - THE TRIAL JUDGE ERRED IN FINDING NO PROMISE NOT TO PROSECUTE	34
POINT III - THE STATUTORY SCHEME INVOLVING A DELEGATION OF POWER TO THE ATTORNEY GENERAL IS UNCONSTITUTIONAL	39
CONCLUSION	40

AUTHORITIES

CASES:

Hutto vs. Ross, 97 S. Ct. 202 (1972)	30
Lego vs. Twomey, 404 U.S. 477 (1972)	28

PAGE

Palermo vs. Warden, 545 F 2d 286 (2 Cir. 1976)..... 38

Santobello vs. New York, 404 U.S. 251 (1971)..... 38

Schenckloth vs. Bustamonte, 412 U.S. 218, 233-234 (1973)..... 30

Schley vs. C.I.R., 375 F 2d (2 Cir. 1967)..... 28

United States vs. Collins, 362 F 2d 792 (2 Cir.1972). 29

United States vs. Farulo, 506 F 2d 490 (2 Cir. 1974). 1

United States vs. United States Gypsum Company, 333 U.S. 364, 395 (1948)..... 28

STATUTES:

21 U.S.C. §811..... 2,39

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee,

vs.

LAWRENCE FRIEDMAN,

Appellant.

----------x

APPELLANT'S BRIEF

Preliminary Statement

Friedman is appealing by virtue of a stipulation entered into on the record pursuant to United States v. Faruolo, 506 F.2d 490 (2 Cir. 1974) prior to the entry of his plea of guilty (A 417). The plea was taken to a charge of conspiracy to deal in quaaludes (methaqualone) a Schedule II controlled substance. The stipulation preserved his right to appeal certain adverse pre-trial rulings.

Friedman was sentenced on March 4, 1977 by Judge Lasker in the Southern District of New York, to

eighteen months probation (A 432). Notice of appeal was filed on March 11, 1977 (A 2, A 434).

Questions Presented

1. Were the rulings of the court below clearly erroneous where, after a hearing, appellant's motion to dismiss the indictment was denied on the ground (1) that leads on which the indictment was predicated were not derived from duress applied to the appellant by federal agents after his arrest; and on the ground (2) that a federal prosecutor had not breached a promise not to prosecute in exchange for the defendant's cooperation.

2. Did the court below err in holding that the statutory scheme embodied in 21 U.S.C. §811 did not constitute an unconstitutional delegation of power to define crimes to the Attorney General?

Statement of the Case

1. The Indictment.

Friedman was named with others in the first count of the indictment (A 3) which charged the defendants with

conspiracy to distribute and possess with intent to distribute, Schedule II controlled substances (quaaludes) in violation of 21 U.S.C. §812, 841, 841 (a) (1) and 841 (b) (1) (A).

Overt act 9 alleged that Friedman on September 24, 1975 while in Clifton, New Jersey had in his possession 10,000 quaalud tablets.

2. Summary of the Case.

Friedman was arrested on the street in Clifton, New Jersey at about 9:30 P.M. on September 24, 1975 by agents of the Drug Enforcement Administration (DEA) and other police after he had delivered 10,000 quaaludes to an undercover agent in the expectation of receiving $15,000 therefor. At the time, Friedman was twenty-seven years of age, a first year law student at Seton Hall* and a teacher. His wife, Margaret, a teacher, who had been in on the negotiations which had been conducted earlier that day at the couple's home in Nutley, New Jersey, was arrested at her home later that night.

While both Friedman and his wife were in custody at DEA headquarters in Manhattan and under duress as

* He has since continued his law school career (A 429-A 430).

described in the testimony at the hearing which is summarized below, Friedman and his wife cooperated with the agents by identifying their source and by helping in the apprehension of that individual and in persuading him to disclose his source.

On the following day in the course of an interview in Newark by Assistant United States Attorney Flynn for the New Jersey District, Friedman informed the prosecutor that he was a law student and wanted to be able ultimately to pass the Character Committee and practice law. Friedman and his wife who was in on part of the interview, claimed that in light of this and other matters hereinafter detailed, Flynn promised that there would be no prosecution for anything related to the instant offense.

Friedman also claimed that Flynn promised to intervene with the Brooklyn District Attorney to avoid prosecution of Friedman for two sales of pills he had made in July of 1975.

It is undisputed that Friedman and his wife were not arraigned before a magistrate but were released after

signing waivers.

Two weeks later Friedman was indicted in the state court in Brooklyn for the July 1975 pill sales.

Notwithstanding Friedman's cooperation with the police thereafter which was part of his claimed arrangement with Flynn, Friedman was indicted in the Southern District by the instant indictment which was ordered sealed. The indictment was opened on January 8, 1976 at which time Friedman was arrested thereon.

As will appear, Friedman did not complain of Flynn's breach of the agreement until he was notified of an imminent trial date by the undersigned who had been assigned to represent him. At that time he gave an account of what had happened. A motion was thereupon made on his behalf to dismiss the indictment on the ground of duress in obtaining the leads on which the indictment was based and on the ground of the prosecutor's broken promise. A hearing hereinafter discussed was thereafter held after which the motion was denied in all respects.

Thereafter a further motion was made on the grounds that the statutory scheme embodied in 21 U.S.C. §811 et. seq. involves an unconstitutional delegation of power by the Congress to the Attorney and on the further grounds, not pressed herein, that there was an improper delegation by the Attorney General to the DEA and no fair warning that quaaludes were a controlled substance.

Following the denial of that motion and the stipulation preserving the right of appeal, the plea of guilty, the sentence and this appeal ensued.

3. The Hearing.

A. Introductory.

Friedman's first motion (A-7) sought a dismissal of the indictment on the ground of duress by the agents in eliciting leads on which the indictment was predicated and a broken promise by Assistant United States Attorney Flynn not to prosecute. On the basis of the factual issues raised in the government's answering papers (A-14 et seq.) and the reply papers of Friedman and his wife (A-27, A-28) a hearing was held.

B. The Duress Claim.

The dispute on the duress claim centered on the testimony of Friedman and his wife that the agents threatened to lodge Mrs. Friedman in Riker's Island overnight if the Friedman refused to cooperate by naming their source.

Mrs. Friedman testified that she was 24 years of age in September 1975 and a school teacher in Passaic. She had been married to Friedman for about three weeks at the time of her arrest at about 9:30 P.M. on September 24, 1975 (A 33, A 34, A 38).

After she was taken into custody at her home by agents Smith and Gray (Scotty) she was brought to DEA headquarters in Manhattan where she was questioned about her source by Agent Hall.* She testified (A 39-A40):

> "Q. What was said on that subject:
>
> A. They wanted to know who the source was. They said to me that things can only get better for you if you cooperate and help us, and at this point, you know, I wanted to speak to my husband, and I was hysterically crying, to say the least, but they just wanted to know

*There was no claim that she was not warned of her rights on her arrest (A 37).

the source and they wanted as much information as I could give them and they promised --

Q. Was anything said about jail at this time?

A. They did threaten me that I was going to go to Riker's Island.

Q. Who said that?

THE COURT: When you say 'threatened you', do you remember how they put it?

THE WITNESS: Well, if you don't cooperate with us you are going to spend the night on Riker's Island.

Q. Was anything said about conditions at Riker's Island?

A. They told me conditions were very bad there, that -- for a young girl such as I it would be very terrifying experience, and it would be a place where you wouldn't want to go. And I was scared.

Q. Do you recall who said that to you?

A. I believe it was Scotty."

She went on to say that her husband yelled to her from his cell at DEA headquarters (A 43):

" Q. Did he yell to you on more than one occasion, do you recall?

A. Maybe twice.

Q. But it was to the same effect both times?

A. Yes, that maybe we should get an attorney or speak to someone because they were trying to convince me to tell them their source, who was the person. They wanted me to give them as much information as I could, and my husband, you know, was hearing dribs and drabs of this, and he thought that maybe we should consult someone. So I was trying to plead with Jeff Hall to try to let me speak to my husband because I just didn't want to tell them anything without speaking to my husband first."

She testified further on cross as to the circumstances which led her to agree with her husband to cooperate (A 66):

"Q. If I could just back up for one moment before we get to the 25th in Mr. Flint's (sic) office on the evening of the 24th when you were with your husband for that five-minute period and Mr. Hall was a few steps away, did you tell your husband at any point that no matter what he did you were going to cooperate?

A. I might have said that.

Q. Did you tell your husband that you thought he ought to cooperate?

A. Oh yes, I was also very scared because of the threats. I didn't want to go to Riker's Island. I was afraid. And I was confused."

Friedman testified in essence that his requests for an attorney were ignored (A 99, 103) and that he cooperated to avoid having his wife sent to Riker's Island, the horrors of which had been vividly sketched for him (A 97). When he was finally allowed to speak to his wife, he related the conversation (A 104-A 105):

> "A. Excuse me. When we finally did speak I said, 'Well, what do you want to do?' and my wife said, 'They are going to send me to Riker's Island', and I said, 'I know, they told me.' "

Although Hall was present when Friedman talked to his wife (A 277) he did not dispute that the conversation was as above-described.

Agent Gray known as "Scotty" acknowledged that he had been in on Mrs. Friedman's arrest and that she had been told that female prisoners were kept on Riker's Island. However he denied telling either Mr. or Mrs. Friedman that Riker's Island was not a good place for women (A 216, A 217).

Agent Hall testified to his conversations with both Friedmans.

In describing on cross his conversation with Mrs. Friedman which led her to decide to cooperate (A 259) he testified that he could not recall whether Riker's Island was mentioned in the conversation (A 260).

Hall acknowledged with respect to Friedman that the latter had asked to consult an attorney after he was arrested and warned of his rights. Hall said that he interpreted this as a refusal on the part of the prisoner to talk and he therefore suspended questioning him (A 252-A 253). It was undisputed that no attorney was ever furnished for the prisoners during the several hours they were in custody.

With respect to Riker's Island, Hall was not clear on direct whether Friedman had been told that his wife would be lodged there; he denied that he himself or anyone in his presence had painted a horror picture of Riker's Island for Friedman in connection with his wife (A 241, A 242). However, it cannot be disputed that Friedman was induced to cooperate because of his wife's fear of being lodged at Riker's as appears above and as

appears from a comment by the court during the cross of Friedman.

Friedman had testified (A 171) that Hall might not have been the one who mentioned lesbians at Riker's but that Hall "told me that my wife was going to Riker's Island unless I cooperated right then and there".

When the prosecutor sought to pursue the mention of lesbians the court said (A 171-A 172):

> "I do not know that you need to because it seems to me that everybody knows these things happen in every prison in the United States or jail which does not mean that I do not think that they are important, but it is implicit that when you say 'Your wife is going to go to Riker's Island', that that is one implied threat itself."

It is undisputed that the Friedmans' disclosure of the defendant Jeffrey Nach as their source led to the disclosure of the defendant Jeffrey Rudd as Nach's source and ultimately to the unravelling of the entire conspiracy charged in the indictment (A 128-A 129)*.

*Neither Friedman nor his wife were ever prosecuted for the substantive offense in New Jersey (A 136).

Judge Lasker's ruling on this aspect of the motion (A-393 - A-396) is discussed in detail in the course of the argument, infra. It is pertinent here, however, to mention that Judge Lasker at the conclusion of the hearing said the following with reference to this as well as the broken promise aspect of the motion (A-384):

> "I suppose obviously if Mr. and Mrs. Friedman are to be believed, the motion probably ought to be granted. And if they are not to be believed then it would be denied. And of course there is a -- talking about beliefs and so on, doesn't necessarily mean that anybody has lied on the stand because I don't believe necessarily anyone has lied on the stand in spite of the obvious differences of recollection."

Notwithstanding the foregoing which represents an acknowledgement by the court of the credibility of the Friedmans, the court apart from other errors mentioned below relied on the hazy recollections of the government witnesses.

C. The Broken Promise.

The testimony of Friedman and his wife was in direct conflict with that of Assistant United States Attorney Flynn and Agents Smith and Gray on the promise not to prosecute. However the court's denial of this aspect of the motion was inconsistent with its view of the only documentary evidence on the issue, namely the

waiver of arraignment executed by Friedman (Ex. A at A 3 and A 26)*. The court said the following in the course of the cross of Agent Smith who had been present during the interview at Flynn's office and who denied that any promise of no prosecution had been made by Flynn (A 323):

> "THE COURT: It doesn't do any good to defer prosecution unless it is deferred permanently.
>
> * * *
>
> Any deferred prosecution as I understand it is a situation in which the decision whether prosecution will occur is put off for a period to determine whether the defendant cooperates on a reasonable basis and if he does then the proposed prosecution is dropped." **

*The waiver read as follows:

> "I, Lawrence Friedman, having been advised of my right to a speedy arraignment after having been taken into custody by Federal Agents, do hereby waive that right in consideration of the suspension of further criminal proceedings against me, until such time as the United States Attorney shall have had the opportunity to evaluate my case in terms of proceeding under a program of deferred prosecution."

** As hereinafter appears Friedman did cooperate by making three cases for the police.

With this introduction we turn to the testimony. Friedman described what happened after he had told Flynn he was a law student (A 107-A 110):

> "Mr. Flynn did all the talking. If Mr. Smith will say anything I will make a reference but by and large it is Mr. Flynn who is going to do the talking. He said to me, 'If I file charges against you, that's it, you have had it with law school, and what we can do is you can help yourself by cooperating.'
>
> I was saying it at this time -- when he said about going across the street to the judge the agents had told me at the D.E.A. headquarters when I kept saying -- when they kept saying cooperate and I kept asking, 'What will happen if I cooperate?' they said the only person who can do anything was the United States Attorney. So when the United States Attorney told me I was going across the street to be indicted or arraigned, excuse me, I like was -- I was just about to say, 'I want to cooperate', because I would have done anything, and as I was saying it he said it. He said, 'Well, you can cooperate.' I said, you know, 'What's cooperation?' He said, 'You work that out between yourself and the agents.'
>
> Q. Go ahead.
>
> A. Then he said, Mr. Flynn -- I said, 'Well, I am a law student, and I am very nervous that I will never be able to practice law and I wanted to do so for such a long time, and I see it just being washed down the drain,' and he said to me, 'Well, if you

cooperate nothing will happen to you.' I didn't understand that. I said to him, 'What do you mean?' And he said to me, 'If you cooperate to our satisfaction you won't -- we won't bring forth these charges.' In other words, you are not going to be arraigned today because you said of your willingness to cooperate, and if that be the case you won't be liable to -- you know, he won't bring charges.

Q. Prosecute?

A. He won't bring charges toward me, and if that would be the case I would be able to practice law.

* * * *

Then Mr. Smith said, 'I've never seen this done before, you are getting a very lucky break,' and at which point I said to him, 'Well, are you sure I'll be able to practice?' Then he went into this thing about deferred prosecution. Now I did not know what deferred prosecution was. I'm still not sure if I understand it. It was never really explained to me. He just kept using the term.

MR. BUCHWALD: Is this Mr. Flynn again?

THE WITNESS: Right.

A. He kept using that term. And I didn't understand it. And he said to me what he said, and this is one more thing that I disagree with what my wife said that I just recalled. He didn't say in six months we will review your record.

He didn't put it that way at all. The way it was put was this way, 'You will cooperate with the agents.'

I said to him, 'Well, what does that mean?' And he explained it to me, working it out with the agents. And I said, 'Will any other related charges be brought?' I said, 'Suppose I work it out with the agents,' and this is just the way I put it, 'Suppose I work with the agents and you think I am doing a good job and everything and you are ready to, you know, not bring any charges, and then you say, "Well, Mr. Friedman, you did a nice job and we're not going to bring these charges but we are going to bring other charges." I said, 'Because what you are saying doesn't include extra charges.'

He then said to me, 'This is it, there will be no other charges. When you will be cooperating you will be cooperating for this, and there will be no further charges brought. This is it.' "

Friedman then went on to talk about the fact that he was likely to face charges on the state court in Brooklyn, that he discussed this with Flynn and that Flynn said he would call the Brooklyn District Attorney so that Friedman's cooperation would mean no indictment in Brooklyn (A 112-A 113).

Mrs. Friedman gave a similar account of Flynn's assurances made in her presence after she was called into

the interview (A 45):

> "Q. Can you tell us to the best of your recollection what was said in Mr. Flynn's office after you got in there?
>
> A. Mr. Flynn assured us that as long as we cooperate everything would be all right. My husband, since he is a law student, was very concerned about his law career, and Mr. Flynn assured him that he will be able to practice, that as long as you cooperate and we already took the step in the right direction by giving our source as Jeffrey Nach, he said that is really fantastic, and the more you do the better it will be for you, and he assured us and promised us that everything would be fine, and he also made a comment that we may like working on this side of the law.
>
> He was just -- we put a lot of trust in him."

Agent Smith who was present throughout Flynn's interview with Friedman initially and then with both Friedmans denied the making of the promise described by the Friedmans. However he acknowledged that Flynn was apprised at the time of the interview of the Friedmans cooperation with respect to Nach, of Friedman's desire to become a lawyer and of Friedman's desire to cooperate by making cases (A 285).

The court, however, was "baffled" by Smith's testimony in light of the fact that Friedman was indicted even though he had helped to make cases (A 328-A 330):

"THE COURT: Let me ask you these questions, Agent. Were you surprised when Mr. Friedman was indicted in the Southern District?

THE WITNESS: No, sir.

THE COURT: You know, you and Mr. Flynn asked him to cooperate and at least he did cooperate to some extent apparently, and you indicated he gave the names of three people and of course he and Mrs. Friedman gave the name of Nach. Without going into the morality of the cooperation, what did he get out of what he did?

THE WITNESS: Well, when we started, we commenced the proceedings, the conspiracy proceedings we were advised that all of the drugs had come through the City of New York. And we told Mr. Flynn that we were going to prosecute for the conspiracy in New York City and that I believe the discussion between Mr. Flynn and Mr. Batchelder in this office were that they would nolle one case with the other. That would combine the two cases for Southern District prosecution, because of the conspiracy.

THE COURT: You mean the New Jersey case was nolled in effect?

THE WITNESS: It was supposed to be combined with the Southern District case, yes.

* * * *

THE COURT: I know. I have been sitting on this case now for six months. But I am baffled as to what you think you gave somebody who gave you some cooperation anyway.

THE WITNESS: Well, I --

THE COURT: I don't know that he is even entitled to get off because I haven't made up my mind yet. That is what the hearing is all about. But I am baffled. You and Mr. Flynn asked for cooperation, he cooperates, maybe not to your utter satisfaction and he is right back where he was, isn't he?

THE WITNESS: Well, his cooperation was very reluctant and very incomplete according to the City Police Department.

THE COURT: Is that the basis upon which you think he ought to be prosecuted? If it is so, then we haven't heard anything yet that deals with this.***"

Flynn testifying from recollection only was very vague except on the question of the promise. Thus when he was asked if Smith had told him that Friedman had helped the agents by urging and getting Nach to disclose his source, Flynn said that that did not "ring a bell" with him (A 362). While denying any assurance of no prosecution he did admit that he wanted to help Friedman and claimed he did so through the waiver of the arraignment (A 359-A 360). He went on to say that after Friedman had been released he "may have called" Agent Smith to see whether there was any cooperation by Friedman and Agent Smith "was complaining to me about what he termed be minimal cooperation" (A 374). Accordingly when Flynn agreed in discussion with the federal prosecutor in the Southern District on the bringing of the instant indictment, he interposed no objection to Friedman's inclusion therein (A 375, A 382). The fact of the matter, however, is that, as appears below, Friedman had given the authorities considerable cooperation.

Flynn was very vague about the Brooklyn situation

which Friedman claimed to have discussed with him and in which, according to Friedman, Flynn had promised to intervene. At first he said he had no knowledge about any case in Brooklyn but he then retracted and said he believed he did make a call to a district attorney in Brooklyn (A 137-A 139). On cross he remembered speaking to a detective in Brooklyn but said "I don't know whether or not I spoke to a district attorney" (A 377). In any event it is undisputed that Friedman was indicted in Brooklyn on October 8, 1975 shortly after his September 24, 1975 interview with ~~Friedman~~ Flynn through Flynn's inaction (A 184).

Detective Giovanniello confirmed Friedman's claim that he had cooperated with him in making cases from October to December 1975 (A 346) as the federal agents had directed (A 291). However despite the fact that Friedman's information enabled the police to make three buys which was what they wanted (A-352) Giovanniello told

Agent Smith that Friedman was "unreliable" as an informant (A-344). The detective explained what he meant (A-355):

> "Well the problem was, your Honor, he would never make meets, he would never come across the river. He said he was going to law school. I said, 'Well you don't do anything on a Wednesday night, let's get together on a Wednesday night. What do you do during the day?' He said, 'Well, I study.' "

However he acknowledged that Friedman had given him ten names of suspects and that there were problems including money problems in making buys from other than the three from whom buys were made; also that marijuana dealers whom Friedman was willing to identify were " a low priority" with the police at the time (A 346-A 351).

The court indicated that Giovanniello's view of Friedman's cooperation was unjustifiably jaundiced (A 354-A 355):

> "If a man gave you three names and procured buys from all three of them, would you consider that cooperation?
>
> THE WITNESS: That's correct, your Honor.
>
> THE COURT: But if he gives you more names and you get three buys then it

is not cooperation; is that right?
I don't want to be cute about it.***"

On the issue of Friedman's delay in complaining of the breach of his agreement with Flynn, Friedman testified that when he was arrested in connection with the Brooklyn indictment he had the following conversation with the Brooklyn district attorney (A-184):

> "When he told me I was indicted, I told him that was not going to happen and there was going to be cooperation with the New York City police and the federal agents and the district attorney.
>
> He said to me that there were no deals and they did not get any phone calls from Mr. Flynn or anyone and that this was strictly a Brooklyn matter."*

Friedman's testimony as above was not contradicted.

When Friedman was arrested on the instant indictment on January 8, 1976 and before he was interviewed by Assistant United States Attorney Flannery he was told, according to Agent Smith, that the "level of his cooperation was very unacceptable" (A-292, A-296).

*The Brooklyn case was pending at the time of the hearing before Judge Lasker (A-184) and at the time of sentence (A-430).

When Friedman was asked on cross whether he had said anything to Flannery about Flynn's promise, he testified he did not mention Flynn's name but he did say that he "thought nothing was going to happen and why is this happening" (A-188). On redirect, the testimony was as follows (A-200 - A-202):

> "You were talking about your conversation with Mr. Flannery. Did you testify here in answer to Mr. Buchwald's questions that you told Mr. Flannery, 'Why is this happening? I understood nothing would happen'. Did you say something along those lines to Mr. Flannery?
>
> A. Yes.
>
> Q. What did Mr. Flannery say when you talked to him about that?
>
> A. He told me that he was not in charge of the case, that it is the Assistant United States Attorney in charge of the case who was on vacation and he knew nothing about this, and he was taking the procedure.
>
> Q. Did you mention anything about Mr. Flynn to Mr. Flannery?
>
> A. In general terms. I don't think I used Mr. Flynn's name.
>
> Q. What did you say?

A. I said that I didn't think anything was going to happen and why is this happening and I thought nothing was going to happen if I cooperated.

Q. He did not press you on that?

A. No.

Q. You did not press it beyond saying what you have already told us. Is that it?

A. Yes."

On being pressed by the court as to why he had not gone to see the undersigned who had been appointed for him by the magistrate after his arrest on the instant indictment, the following occurred (A-206 - A-207):

"THE COURT: I am asking you when you were arrested here Mr. Block was appointed, right, and who told you Mr. Block was appointed?

THE WITNESS: I think the magistrate.

THE COURT: Why didn't you go to see him?

THE WITNESS: Because I just was very confused and I thought in my own mind that everything -- if my cooperation would be taken care of and I thought that, you know, the agents would contact me and that I would know what to do.

THE COURT: This keeps happening time after time and you still go on thinking the same thing.

THE WITNESS: Because I was aware of what was told to me and what was promised and I believed it.

THE COURT: Why didn't you question why you were indicted time after time?

THE WITNESS: I did.

THE COURT: Why didn't you go to a lawyer and say, 'What the hell is going on here?'

THE WITNESS: When I sent to see Mr. Block I realized the mistake I made."*

The findings and ruling on this aspect of the motion (A-391 et seq.) are discussed in the course of the argument, infra.

*The undersigned explained at the hearing that when he inquired about Friedman after his appointment as his counsel, he was told that Friedman was cooperating and not to worry about the case (A-208).

POINT I

HE TRIAL JUDGE ERRED IN FINDING NO DURESS.

It is recognized that the government's burden of establishing that a confession is voluntary, need be met only be a preponderance of the evidence, Lego v. Twomey, 404 U.S. 477 (1972) and that the findings of the court may be set aside only if clearly erroneous. However, it is contended here that the government's evidence did not preponderate and that the ruling below was clearly erroneous. See United States v. United States Gypsum Company 333 U.S. 364, 395 (1948) and Schley v. C.I.R. 375 F 2d 747 (2 Cir. 1967) to the effect that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". Under this standard the no duress ruling requires reversal.*

As has been shown above, Friedman's wife was "scared" about being lodged at Riker's Island, her husband shared her concern and the court itself regarded

*The same standard requires reversal on the broken promise aspect, argued infra.

the talk by the agents about Riker's as a threat. That this was a threat by the agents to induce cooperation is clear, because there were holding cells at DEA headquarters and there consequently was no need to lodge Mrs. Friedman at Riker's for the few hours until the morning when she could have been arraigned.

In its ruling the court totally ignored this aspect of the case. Indeed the court completely missed the point involved as is apparent from its reliance on United States v. Collins, 362 F 2nd 792 (2 Cir. 1972) (A-395). Collins involved a situation where there was renewed questioning of a suspect after he had refused to talk initially and this Court held that nothing decided in Miranda was meant to prohibit police officers from ever asking a defendant to reconsider his refusal to answer questions. In the case at bar, on the other hand, there was no renewed questioning of Friedman. What happened here is that his wife who had never invoked her right to remain silent, agreed because of her fear of incarceration at Riker's to persuade her husband of three weeks, who also was concerned about his wife's

incarceration at Riker's, to disclose their source.*

This was therefore a situation where Friedman gave up his right to remain silent because of impermissible coercion exercised principally against his wife. Cf. Schenckloth v. Bustamonte, 412 U.S. 218,233-234 (1973) and see Hutto v. Ross, 97 S. Ct. 202 (1976) where the Court reaffirmed the rule that the test of voluntariness is whether the confession was "extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) the exertion of any improper influence."

The crucial finding of the court was as follows (A-395):

> "I find that it was Mr. Friedman's conversation with his wife and his discovery in that conversation that she had decided to cooperate, and I think decided for very sound reasons, which persuaded him that he should also cooperate with the police in this case, and I agree with him, and I agree with her, that what they did was sound and mature and acting as good citizens.

*Agent Hall did not think the unnecessary mention of Riker's Island constituted a threat (A-260) thus differing with the court (A-171-A172) and any fair view.

> Under the circumstances, however, I do not find, and I do not believe it to be the case, that either Mr. or Mrs. Friedman's will were overborne. They were both mature, knowing citizens. He had entered law school. They had a brush with the law before. They knew entirely what they were doing."

What the court said were "sound reasons" for Mrs. Friedman's decision to cooperate was her fear of having to spend the night at Riker's Island. This is clear from Friedman's testimony about the conversation he had with his wife when he was finally permitted to talk to her. He quoted his wife as saying: "They are going to send me to Riker's Island" and he said "they told me"; after which he said "We decided we were going to tell who our source was" (A-104 - A-105)*. The Riker's Island threat was the determining factor.

The court below erred in another particular when it chose to disregard Friedman's renewed request for a lawyer made at DEA headquarters (A-395). Friedman's testimony as to that (A-103 - A-104) was consistent with

*Hall, to whom the disclosure was made, agreed it was made after the couple had spoken together (A-245) and Smith said that the conversation was in Hall's presence (A-277).

with what he had said about his reiterated requests for an attorney in his affidavit in s[illegible]t of his motion (A-11). He said there "On my arrival at [illegible]eadquarters I was warned of my rights but I steadfastly stated that I had nothing to say and wanted a lawyer."

This case comes down to a simple situation where Friedman's requests for a lawyer were disregarded as he claimed (A-104) and his will as a newly married man was overborne by the deliberate threat, unnecessary under the circumstances, to lodge his wife at Riker's Island.

The court below erred in still another respect in stating that even if it found that Friedman's rights had been violated it would merely suppress his statement about Nach being his source rather than dismiss the indictment (A-393). However the record is clear that "the poisonous tree" principle is applicable here. Friedman named Nach as his source; Nach named Rudd as his source and the other defendants undoubtedly were identified through investigations on the basis of these leads (A-128 - A-129).*

*Counsel's attempt to prove this was blocked by the court which stated without objection from the government that "I think Mr. Buchwald doesn't seriously contest that aspect of the case" (A-129).

Since there was no prosecution in New Jersey for the substantive offense, it is clear that the entire conspiracy charge here involved was formulated on the basis of the impermissibly compelled testimony of Friedman.

In light of the foregoing, the court's ruling on this branch of the motion should be held to have been clearly erroneous. The indictment accordingly should be dismissed as the fruit of a poisonous tree.

POINT II

THE TRIAL JUDGE ERRED IN FINDING NO PROMISE NOT TO PROSECUTE.

The trial judge's conclusion that no promise to prosecute was made conflicts with the view he himself took of the waiver of arraignment executed by Friedman. In referring to the phrase "deferred prosecution" which is used in the waiver, the court said (A-323):

> "And deferred prosecution as I understand it is a situation in which the decision whether prosecution will occur is put off for a period to determine whether the defendant cooperates on a reasonable basis and if he does then the prosecution is dropped."

Notwithstanding the foregoing view which fits the case at bar like a glove and which contradicts Flynn's version, the court stated that it credited Flynn's testimony that there was no promise which he broke.

The notion expressed by the court in its decision (A-392) that the agreement that Flynn made with the Friedmans was so that the government "would have time to consider its case against Friedman and a just method

of disposition of it" is not supported by the evidence. All the police who ever had anything to do with Friedman, were in on his arrest (A-248 - A-259)*, and his minor role as a mere distributor in the case must have been corroborated by Jeffrey Nach when he was questioned. Further, Flynn had been advised by Smith of the cooperation the Friedmans had given with respect to Nach (A-283-284). Not only did Flynn need nothing more to make an evaluation, but contrary to the undertaking by the government to evaluate the case set forth in the waiver of arraignment, Flynn made no evaluation at all. This is shown by Flynn's answer on direct to a question by the court as to whether Friedman and his wife had cooperated since their interview with him: "Quite frankly, your Honor, I have no really concrete knowledge of what they have done or not done". (A-140).

That the government treated Friedman callously is shown by the way it handled his cooperation. In the first

*This included the police who had arrested him for the sales of pills in the preceding July, and the New Jersey police who had arrested him in New Jersey for having a marijuana plant (A-52).

place he was supposed to work with the federal agents (A-117), yet Agent Smith turned him over to work with Detective Giovanniello (A-291). Although Friedman made three cases while cooperating, Smith accepted Giovanniello's baseless report that Friedman was an "unreliable informant", reported the same to Flynn who, on that basis, interposed no objection to Friedman's inclusion in the instant Southern District indictment.

The trial judge relied heavily on what he saw as an acknowledgement by the Friedmans that Flynn could not give any guarantees "about anything" (A-391). However when the passages cited by the court involving Mrs. Friedman's testimony are read (A-73, A-76 and A-78), it is clear that she was explaining that she and Friedman understood that Flynn could not guarantee that Friedman, who had just started law school, would be able to have a law career. She was not shaken in any way in her testimony that Flynn would see to it that his arrest would not

interfere with his prospective law career. Mrs. Friedman testified on cross that there came a point in the interview with Flynn when she told her husband (A-76 - A-77):

> "I didn't say shut up, I said be quiet, because Mr. Flynn came across as everything is going to be all right; as long as we cooperate I assure you that everything is going to be fine. Larry will be able to practice law, and everything will be okay. So at that point, I mean, I felt good. I felt as if I really trusted Mr. Flynn and everything he said was true and as long as we cooperate to the best of our ability which we did, everything would be fine, and I was relieved, and told my husband relax, be quiet, because he was very nervous, uptight and scared."

Flynn and Agent Smith both maintained that the most that was said was that any cooperation by Friedman would be brought to the attention of the sentencing judge (A-368, A-321). The court recognized that this was a routine statement employed by agents and prosecutors (A-368). It is hard to conceive that if that was all that was said, Friedman would have cooperated by making three cases as he did before he was indicted in the Southern District. Indeed any sentencing judge would have regarded his cooperation in connection with Nach, given

before his interview with Flynn, as sufficient to manifest remorse.

While the trial judge stated that the fact that Friedman was "dilatory" in asserting the broken promise supported his conclusion that no promise was made as alleged, he did not base his conclusion on Friedman's dilatory action (A-393). However, whether or not Friedman's explanation for his failure to bring the matter to the attention of the undersigned sooner is credited, the fact remains that the waiver form and the surrounding circumstances described above lead inescapably to the conclusion that the promise was made as Friedman contended and that the government callously jobbed him around as an informant at the mercy of an unreasonable New York City policeman.

In short this was a case resembling Santobello v. New York, 404 U.S. 257(1971) and Palermo v. Warden, 545 F 2d 286 (2 Cir. 1976). The promise not to prosecute and to intervene in Brooklyn in exchange for the defendant's cooperation was made and was adhered to by Friedman for his part. It was breached when Flynn failed to intervene in Brooklyn and sanctioned Friedman's prosecution by the instant indictment.

POINT III

THE STATUTORY SCHEME INVOLVING A DELEGATION OF POWER TO THE ATTORNEY GENERAL IS UNCONSTITUTIONAL.

For the reasons assigned in the appellant Pastor's brief in United States v. Pastor & Weiner, Docket No. 76-1364, presently pending for decision by this Court, the delegation of power by Congress to the Attorney General provided for in 21 U.S.C. §811 should be held unconstitutional. Judge Lasker in his adverse ruling (A-419) on the motion raising the point (A-401) relied on Judge Motley's decision in Pastor, now sub judice in this Court.*

*The delegation by the Attorney General to the DEA and the lack of fair warning are not complained of on this appeal.

CONCLUSION

For the reasons above assigned the judgment below should be reversed and the indictment dismissed.

Respectfully submitted,

Frederick H. Block
Attorney for Appellant

Frederick H. Block
Harvey N. Goldstein
Peter Brogan
Of Counsel.